Supreme Court, U. S.
FILED
NOV 6 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

PETITIONER'S REPLY BRIEF

THOMAS C. WALSH
CHARLES A. WEISS
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Petitioner

Of Counsel:
BRYAN, CAVE, McPHEETERS
& McROBERTS

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT:

I. RESPONDENT'S PIECEMEAL CONSIDERATION OF THE FACTS DOES NOT CONFRONT THE CONSTITUTIONAL QUESTION OF WHETHER IN THE CONTEXT OF THE TOTAL PICTURE PRESENTED TO THE COURT THERE WAS A BONA FIDE DOUBT RAISED AS TO PETITIONER'S MENTAL CAPACITY TO STAND TRIAL. 2

II. THE ISSUE OF WHETHER PETITIONER'S RIGHTS WERE VIOLATED WHEN HE WAS TRIED IN HIS ABSENCE IS PROPERLY AND SQUARELY BEFORE THIS COURT. 7

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Clonch v. Boles, 419 F.2d 393, 394 (4th Cir. 1969) 11

Cox v. Louisiana, 379 U.S. 536, 545 at n.8 (1965) 7

Cureton v. United States, 396 F.2d 671, 676 (D.C. Cir. 1968) 12

Diaz v. United States, 223 U.S. 442 (1912) 12

Douglas v. Alabama, 380 U.S. 415, 422 (1965) 6

Dusky v. United States, 362 U.S. 402 (1960) 11

Hansford v. United States, 365 F.2d 920, 925-26 (D.C. Cir. 1966) 11

Haynes v. Washington, 373 U.S. 503, 515-16 (1963) 7, 9

Moore v. United States, 464 F.2d 663, 666 (1972) 2, 11

Page

Napue v. Illinois, 360 U.S. 264, 271-72 (1959) 6

Pate v. Robinson, 383 U.S. 375 (1966) 2, 10, 11

Rand v. Swenson, 365 F.Supp. 1294, 1299 (E.D. Mo. 1973), *affirmed* 501 F.2d 394 (8th Cir. 1974) 11

Sanders v. United States, 373 U.S. 1, 8 (1963) 8

State v. Moreland, 351 S.W.2d 33, 37 (Mo. 1961) 9

Whitus v. Georgia, 385 U.S. 545, 550 (1967) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

PETITIONER'S REPLY BRIEF

INTRODUCTION

Although respondent's factual presentation contains a number of inaccuracies resulting partly from omissions of significant and relevant facts and partly from misinterpretation of the evidence, we do not consider it appropriate or necessary to engage in a lengthy and detailed refutation of respondent's version of the facts. Petitioner submits that the Statement of the Case in his opening brief accurately and comprehensively details the facts relevant to the issues before this Court.

ARGUMENT

I.

RESPONDENT'S PIECEMEAL CONSIDERATION OF THE FACTS DOES NOT CONFRONT THE CONSTITUTIONAL QUESTION OF WHETHER IN THE CONTEXT OF THE TOTAL PICTURE PRESENTED TO THE COURT THERE WAS A BONA FIDE DOUBT RAISED AS TO PETITIONER'S MENTAL COMPETENCY TO STAND TRIAL.

Respondent ignores petitioner's argument that the Missouri courts below failed to consider and weigh all of the evidence together as a whole but, rather, impermissibly isolated each separate fact and determined whether that fact standing alone raised a reasonable doubt about petitioner's competency. That approach was specifically rejected by the rationale of this Court's opinion in *Pate v. Robinson*, 383 U.S. 375 (1966) and also by the Ninth Circuit in *Moore v. United States*, 464 F.2d 663, 666 (1972). The critical issue is whether or not the composite picture before the trial court raised—or should have raised—any reasonable doubt as to petitioner's mental competency to proceed with his trial.

Faced with uncontroverted facts, which undeniably on their face raise serious questions concerning petitioner's fitness, respondent vainly attempts to dilute their significance by fragmenting each incident of irrational behavior and ignoring the totality of circumstances portrayed by the record. Respondent's splintered whitewash of the facts can be distilled into three major assertions:

(1) That petitioner's trial counsel did not "seriously and sincerely" believe that his client lacked the mental capacity to stand trial (Resp.Br. 24);

(2) That petitioner's shooting of himself was not an attempt at suicide (Resp.Br. 30-31); and

(3) That the testimony of Drs. Shuman and Lum at the Rule 27.26 hearing was meaningless (Resp.Br. 27-28).

We will discuss respondent's misconceptions of the evidence *seriatim*.

(1) Respondent's baseless attack on the sincerity of petitioner's trial counsel betrays its obvious frustration in attempting to justify its untenable position that there was no bona fide doubt of petitioner's competency. Faced with a record of repeated requests for a psychiatric examination and a hearing, respondent lamely responds that trial counsel was not sincere in his efforts and did not seriously believe that petitioner might be mentally incompetent. The State suggests that those requests were nothing but a ruse to obtain a delay of the trial. These contentions are not only belied by the record but are directly contrary to the State's own position in consenting to a psychiatric examination (A.14). The problem was not counsel's lack of sincerity or advocacy, but the trial court's impatient unwillingness to listen to him.

Although respondent gingerly argues that the written motion filed by trial counsel for a psychiatric examination was "not in proper form" (Resp. Br. 25), it cites no authority prescribing any particular form. Indeed, there is none. Respondent's exaltation of form over substance is unpersuasive because everyone, including the court, understood that petitioner's attorney was requesting a psychiatric examination. Respondent fails to come to grips with the overwhelming record of repeated pleas but summarily brands them as "totally empty and devoid of meaning"

(Resp. Br. 25), and suggests that counsel was raising an insanity defense on the merits rather than objecting about proceeding with the trial. Apparently, respondent yet fails to comprehend the teachings of *Pate*, for there a similar argument that trial counsel failed appropriately to raise the issue of defendant's competence was made by the State of Illinois and was flatly rejected by this Court, l.c. 385, n. 6:

* * *

> "Even if counsel may also have meant to refer to the statutory provisions dealing with commitment for present insanity . . . , this fact would not affect the determination that counsel's *words* raised a question as to competence that the trial judge should have considered."[1]

(2) Respondent confronts the admitted facts that petitioner (a) shot himself in the stomach during his trial, (b) was rushed unconscious to St. Louis City Hospital, (c) underwent emergency surgery there that same morning, (d) was transferred the following day to Homer G. Phillips Hospital where he underwent a second operation, and (e) was hospitalized twenty-one days in all, by theorizing that the petitioner did not actually intend to take his own life but staged the act, confident that he would not in fact die from the self-inflicted wound (Resp. Br. 30-32).[2] The very record which respondent built at the trial below refutes its present contentions. Patrolman Dampier, whom it called as its witness at the hearing on the Motion for a New

[1] Emphasis ours here and throughout this brief except where otherwise indicated.

[2] Apparently, respondent is now retreating from its strategy asserted in its Brief in Opposition to the Petition for Certiorari where it assumed that petitioner had attempted to kill himself (Br. in Opp., p.5).

Trial, testified that he responded to a call for *"attempted suicide"* (A.94). He further testified that petitioner told him "he would rather be *dead* than go to trial for something he didn't do," so he got his rifle and shot himself (A.97).

Moreover, respondent's view does little to eliminate the doubt of petitioner's competency. Certainly, one who blasts a hole in his own bowels as a means of avoiding trial, even if he did not intend to kill himself, can scarcely be deemed normal. Petitioner was free on bond and could have merely absconded. In retrospect, the alternative mode of escapism employed by petitioner merely served to confirm his mental instability and need for help. In any event, the Missouri Court of Appeals, in deciding the case, assumed that "Drope's action in shooting himself was in fact a bona fide attempt at suicide" (A.222), and since the State did not take issue with that assumption in its Brief in Opposition, it is not in a position to retry the facts or to recast the issues at this juncture.

(3) Respondent attempts to sweep under the rug the compelling testimony of Drs. Lum and Shuman at the Rule 27.26 hearing, by claiming that their testimony was meaningless because it was not presented to the trial court prior to conviction and because they possessed a higher degree of expertise than the trial judge. Respondent's argument is as ironic as it is illogical, for if the trial court had properly accorded petitioner his rights in the first instance, the physicians' testimony would, indeed, have been presented to the court prior to trial.[3] Moreover, the very reason for requiring a psychiatric examination is the presumption

[3] In *Schmidt v. State*, 307 N.E.2d 484 (Ind.App. 1974), the court permitted the post-trial testimony of two psychiatrists to be used to establish the reasonable doubt about the defendant's sanity at the time of trial.

that the court needs the aid of qualified experts in order to make a meaningful determination as to the defendant's competency. In effect, respondent's position, in capsule form, is that a defendant is not entitled to a pre-trial evaluation of his competency and that a post-trial analysis is too late. Such a proposition must rank among the most remarkable ever presented to this Court.[4]

One final comment appears appropriate regarding respondent's efforts to erect a protective procedural shield around the findings of fact and conclusions of law of the Missouri courts. Respondent seeks to insulate the Missouri courts' rulings from this Court's scrutiny by invocation of the "clearly erroneous" standard prescribed by Missouri Rule 27.26. It is well-settled, however, that this Court's *certiorari* power is not circumscribed by the niceties of state procedural rules. In *Douglas v. Alabama*, 380 U.S. 415, 422 (1965), the Court held that "we follow our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." The language in *Napue v. Illinois*, 360 U.S. 264, 271-72 (1959), could hardly be more conclusive or dispositive:

> "[T]he State argues that we are not free to reach a factual conclusion different from that reached by the Illinois Supreme Court . . . The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Cooper v. Aaron*, 358 U.S.

[4]Respondent's further statement that Drs. Shuman and Lum's testimony was unmindful of "what is legally practical" is dispelled by the fact that Dr. Lum is employed by the State of Missouri specifically for the purpose of administering psychiatric examinations pursuant to Chapter 552 (Mo.Rev.Stat.), Missouri's Mental Responsibility statute (A. 150-51).

1. This principle was well stated in *Niemotko v. Maryland*, 340 U.S. 268, 271:

> ' "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." '

> "It is now so well settled that the Court was able to speak in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121, of the 'long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.' "[5]

Although this Court's function must not be impeded by state imposed scope-of-review restrictions, it makes no difference in the context of this case what type of critique is applied to the actions of the Missouri courts, for the judgment being reviewed here is not only "erroneous" but manifestly, prejudicially and unqualifiedly so.

II.

THE ISSUE OF WHETHER PETITIONER'S RIGHTS WERE VIOLATED WHEN HE WAS TRIED IN HIS ABSENCE IS PROPERLY AND SQUARELY BEFORE THIS COURT.

It would be easier for petitioner to reply to Point II of Respondent's Brief if the State's position expressed

[5]See also, *Whitus v. Georgia*, 385 U.S. 545, 550 (1967), where, as here, there was no controversy as to the constitutional principle involved, the question being its application to the facts disclosed in the record; *Cox v. Louisiana*, 379 U.S. 536, 545 at n.8 (1965); *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963).

therein were intelligible. The only conclusion that emerges forcefully is that respondent has despaired of any attempt to confront petitioner's second point on its merits. Whether the morass of befuddling procedural arguments was purposefully contrived to muddy the waters or whether the confusion was simply generated by imprecision of language, we do not know. Neither can we discern what the State's position is, except that somehow this Court is purportedly without power to decide petitioner's constitutional claims. At the risk of conjecture, however, we will endeavor to meet the apparent substance of respondent's position.

Respondent concedes (Resp. Br. 19) that "the second question now raised by the petitioner before this Court was also presented to the Missouri Court of Appeals." Later in its brief, however, the State seems to withdraw from that admission and to assert that the constitutionality of trying and convicting petitioner in his absence was decided adversely to petitioner on his direct appeal by the Supreme Court of Missouri and was thus *res judicata* to the Missouri Court of Appeals in the post-conviction proceeding. Significantly, respondent refers to no statutory or case authority in support of this proposition. To our knowledge, there is none. The issue raised by Petitioner's Point II is not a factual one but a legal one of constitutional dimensions. Our judicial system does not permit the concept of *res judicata* to perpetuate the unconstitutional incarceration of an accused. Respondent's unsupported suggestion is directly antithetical to the very purpose and intent of the deep rooted right of habeas relief and was soundly spurned by this Court in *Sanders v. United States*, 373 U.S. 1, 8 (1963):

> "If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia, supra*, at 402, access to the courts on habeas must not be impeded. *The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.*"

Since Missouri Rule 27.26 is merely a codification of the common law writ of habeas corpus (See Rule 27.26(a)),[6] its scope is no more limited than that of the federal writ. Moreover, neither the Rule, nor Missouri case law prohibits a prisoner from raising constitutional errors in a Rule 27.26 motion, even though they may have been raised in a prior proceeding. Rule 27.26(b)(3); *State v. Moreland*, 351 S.W.2d 33, 37 (Mo. 1961).

Additionally, the following observations are apt. First, while the Missouri Supreme Court on direct appeal did consider the question of petitioner's absence, it did not assess such absence in light of his mental condition. Second, the issue of petitioner's absence was fully litigated by the courts below in this Rule 27.26 proceeding, and at no time did respondent assert that it was barred by *res judicata*. The Missouri Court of Appeals did not consider the Missouri Supreme Court's decision *res judicata*, but made its own ruling on the point, which respondent contends is not "clearly erroneous" (Resp.Br. 34). Third, as pointed out above, this Court has always undertaken an independent examination of the whole record and is not "bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963).

Respondent's "exhaustion" argument is equally baffling. Respondent seems to contend that since, in its view, the "real" issue of whether or not petitioner was *in fact* mentally incompetent has not been litigated, the issue of petitioner's absence from trial cannot be

[6] The entire text of Rule 27.26 is set forth at pages 1b through 5b of petitioner's principal brief.

reviewed on this writ of certiorari as petitioner has not exhausted his remedies.[7] Respondent again misses the point. Whether or not petitioner was *in fact* ultimately mentally incompetent is not an issue here and never has been in this proceeding.[8] Since under Missouri law, a psychiatric examination and hearing is a prerequisite to any finding of incompetency, the state courts, by denying petitioner his constitutional right to a psychiatric examination and hearing at the time of trial, have effectively precluded him from any opportunity of proving he was mentally unfit to proceed with trial or to waive his right to be present.[9] In short, the

[7]However, respondent's contentions are contradictory even on this point. In one sentence, on page 33 of its brief, respondent states that the question of "whether [petitioner's] absence was involuntary in that it was due to mental incompetency" was "apparently litigated by the petitioner." But in the very next sentence, respondent, states that "petitioner, it is evident from the record, actually made no attempt to litigate the question of his mental competency."

[8]Throughout the proceedings on petitioner's Rule 27.26 motion in the state courts below and even at this level, respondent has either failed to recognize or attempted to obfuscate the real issue. The State has repeatedly suggested that the real issue is whether there was proof that petitioner, *in fact, was* mentally incompetent. In the state courts and again, in its Brief in Opposition in this Court (p. 12), respondent stated: "Furthermore, the respondent cannot help but believe that the principal issue by the petitioner here is a false one. The *real issue* is whether petitioner *in fact* was suffering from a mental disease or defect excluding fitness to proceed."

[9]The Court in *Pate*, supra at 387, clearly recognized the impracticability of attempting to retrospectively determine a defendant's mental competency as of the time of his trial:

constitutionality of trying and convicting petitioner in his absence was placed point-blank before the Missouri Court of Appeals, to which this Court's writ is directed, and was decided adversely to petitioner. There is no exhaustion problem as to this issue.

Respondent further argues that if this Court rejects the state court's determination as to the voluntariness of petitioner's absence from trial, then "this Court is provided no basis for taking remedial action as it is not known what action is warranted" (Resp. Br. p. 34). Such an astonishing underestimation of this Court's powers could only have resulted from a failure either to read or to comprehend *Pate v. Robinson*, where it was stated at 386:

> "Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, *we direct that the writ of habeas corpus must issue* and Robinson be discharged, unless the State gives him a new trial within a reasonable time."

See also, *Moore v. United States*, 464 F.2d 663, 666-67 (9th Cir. 1972); *Clonch v. Boles*, 419 F.2d 393, 394 (4th Cir. 1969); *Hansford v. United States*, 365 F.2d 920, 925-26 (D.C. Cir. 1966); *Rand v. Swenson*, 365 F.Supp. 1294, 1299 (E.D. Mo. 1973), *affirmed* 501 F.2d 394 (8th Cir. 1974).

> "It has been pressed upon us that it would be sufficient for the state court to hold a limited hearing as to Robinson's mental competence at the time he was tried in 1959. If he were found competent, the judgment against him would stand. But we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. *Dusky v. United States*, 362 U.S. 402 (1960). The jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties."

Respondent also erroneously attempts to restrict the applicability of *Diaz v. United States*, 223 U.S. 442 (1912), to only those persons accused of a capital crime who are *in custody*. The Court's holding, however, was not so confined. The Court clearly held in *Diaz* that two separate classes of defendants were incapable of waiving their right to be present: (1) those who are in custody because their presence or absence is not within their own control, *and* (2) those who are charged with a capital offense "because, in addition to being *usually* in custody, [they are] deemed to suffer the constraint naturally incident to an apprehension of the lawful penalty that would follow conviction." *Id.* at 445.

Finally, respondent's endorsement of the trial court's finding that petitioner had *voluntarily* absented himself from trial overlooks the fact that the holding was predicated on the erroneous view that petitioner's absence was *presumed* to have been voluntary (A.111). Such a presumption, however, is repugnant to the controlling rule stated by Judge Fahy in *Cureton v. United States*, 396 F.2d 671, 676 (D.C. Cir. 1968):

> "In the above circumstances, taking into consideration the right, the obligation, and that the orderly administration of justice takes account on the one hand of the importance of a defendant's presence and, on the other hand, the need for control of the situation by the court, we conclude that if a defendant at liberty remains away during his trial the court may proceed *provided it is clearly established that his absence is voluntary*. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away."

CONCLUSION

The record in this case manifestly discloses that petitioner has been denied his constitutional rights. For the reasons stated, the judgment should be reversed and petitioner's conviction vacated.

Respectfully submitted,

THOMAS C. WALSH
CHARLES A. WEISS
500 North Broadway
St. Louis, Missouri 63102

Attorneys for Petitioner

Of Counsel:

BRYAN, CAVE, McPHEETERS
& McROBERTS